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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SAVAGE ENTERPRISES, INC., Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 87-164 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER involves an appeal by Savage Enterprises, Inc. ("Savage") of the Puget Sound Air Pollution Control Agency's ("PSAPCA") June 4, 1987 Notice and Order of Violation No. 6693 for alleged violations of Regulation I, Sections 10.03, 10.04(b), 10.05, and WAC 173-400-075 in the handling of asbestos materials on April 1, 1987 in Seattle, Washington.

The formal hearing was held on February 1, 1988 in Seattle, Washington. Board members present were Judith A. Bendor (Presiding), Wick Dufford (Chairman) and Lawrence J. Faulk. Appellant Savage was represented by Douglas W. Elston, Attorney with Ulin, Dann, Elston & Lambe.

S. F. No. 5978—OS—8-87.

PSAPCA was represented by Attorney Keith D. McGoffin of McGoffin & McGoffin. Court Reporter Pamela J. Brophy of Gene Barker & Associates recorded the proceedings.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. Appellant filed a brief on January 28, 1988. From the foregoing, the Board makes these

FINDINGS OF FACT

I

The Puget Sound Air Pollution Control Agency is an activated air pollution control authority under the terms of the State of Washington Clean Air Act. PSAPCA has filed with the Board certified copies of its Regulation I of which the Board takes official notice.

II

Savage Enterprises, Inc.'s place of business is in Seattle, Washington. It specializes in asbestos-removal work. It was hired by Coppage Realty to remove asbestos insulation from a building located at 4700 - 4704 11th Avenue NE, a/k/a 1104 NE 47th Street, and from some pipes at 4706 1/2 11th Avenue NE in Seattle, Washington.

Coppage Realty was not named in PSAPCA's Notice and Order and is not a party to this appeal.

III

The Notice and Order of Civil Penalty alleges that Savage violated WAC 173-400-075 and Sections 10.03(a) and (b), 10.04(b)(2)(iii)(A), (B) and (C), and 10.05(b)(1)(i) and (iv) of Regulation I on or about

April 1, 1987, at 1104 NE 47th (a/k/a/ 4700 - 4704, 11th NE) in Seattle, Washington by failing to provide written notice of intent to remove asbestos, and failing to perform requirements designed to prevent asbestos fibers from escaping to the air between removal and ultimate disposal. A $1,000 penalty was assessed.

IV

Asbestos is a substance which has been specifically recognized for its hazardous properties. It is one of only eight pollutants classified pursuant to Section 112 of the Federal Clean Air Act for the application of National Emission Standards for Hazardous Air Pollutants (NESHAPS). It is a substance which by Federal Clean Air Act definition:

> causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness. Section 112.

Kemp Enterprises, et al. v. PSAPCA, PCHB No. 86-163 (February 18, 1987).

V

The federal asbestos handling regulations have been adopted by the Washington State Department of Ecology. WAC 173-400-075(1). PSAPCA has adopted its own regulations on removal of asbestos, designed to meet or exceed the requirements of the federal/state regulations. PSAPCA Regulation I, Article 10. PSAPCA's regulations govern work practices.

VI

The PSAPCA notification requirements (Regulation I, Section 10.03) are an integral part of the Regulations, designed to give the Authority advance notice of the removal operation, so that inspections can be made and the public's safety protected with an ample margin of safety.

An asbestos contractor has a responsibility to file the notice, providing the requisite information, including the address and description of the property, the amount of asbestos to be removed, the starting and completion dates of the removal project, and so forth, and to pay the appropriate fee.

VII

In this case there are three Seattle buildings owned by Coppage Realty that need to be mentioned. The building on the corner of 11th Avenue and NE 47th has two stories. The first floor's address is 1104 NE 47th; the second floor is numbered 4700 to 4704 11th NE. Adjacent to this building was another building also numbered 4706 11th NE; in back of this building was a small cottage numbered 4706 1/2 11th NE. Savage did asbestos removal work at 1104 NE 47th in the first floor furnace room, and also at 4706 1/2 11th NE in the cottage. The removal work in the cottage is not the subject of the Notice and Order of Penalty or of this appeal.

VIII

On March 11, 1987, James Walsh, President of Savage Enterprises,

Inc., filed with PSAPCA a Notice of Intent to remove 6 linear feet of asbestos from 4706 1/2 11th Avenue NE in Seattle. The minimum fee of $25, based on the amount to be removed, was enclosed. In the application the building was listed as a cottage. There was no statement on the form that any removal would occur at any other address or other building.

No notification for asbestos removal at 1104 NE 47th was received by PSAPCA, and we conclude that none was filed. We find unconvincing appellant's contention to the contrary; such contentions were not based on first-hand knowledge, but rather were based on general statements about the company's customary practices. Moreover, no documentary evidence, such as a conformed copy of the allegedly filed notice or a cancelled check for the fee were offered.

IX

On April 1, 1987, at Coppage Realty's request, an inspector for PSAPCA inspected 1104 NE 47th. Coppage had informed PSAPCA that it would be demolishing the building. Pre-demolition inspections are advisable because PSAPCA regulations proscribe demolition of buildings containing asbestos unless the asbestos is encased in concrete or other material. Regulation I, Section 10.04(a).

In the furnace room, the inspector found empty bags for asbestos, and dry and friable material which appeared to be asbestos. No asbestos removal work appeared to be in progress. No asbestos removal

equipment was seen, nor any signs warning of removal operations, nor any internal containment barriers.

Samples of the material were taken as follows:

Sample #1 from the floor near the furnace below a hole where a chimney pipe had been;

" #2 in the hole for the pipe;

" #3 around a pipe joint leading from the furnace; and

" #4 on the ceiling.

The samples were labeled and the inspector prepared a chain of custody for each sample. The samples were delivered to the Department of Ecology (DOE) laboratory in Manchester, Kitsap County.

X

The DOE laboratory has recently been certified by the U.S.A. Environmental Protection Agency (EPA) to do asbestos analysis tests. Prior to this federal certification process, in November 1986, the laboratory had successfully passed the EPA "Round Robin" procedure, whereby EPA provided samples to the laboratory for analysis. The laboratory's analytic results were then compared to other laboratories throughout the nation and found to be acceptable.

The asbestos tests DOE performs are nationally accepted tests, ones also widely accepted in the scientific community. The tests involve the use of polarized light microscopy by which the presence of asbestos in a sample can be objectively determined. The percentage by volume of asbestos material present is derived by visual observation

and estimation using a stereoscope, through which the distinctive features of asbestos fibers can be seen. This subjective aspect of the process is spot-checked by a second person who looks at one out of five samples each analyst tests. The DOE laboratory technician who performed the analyses on the four samples had training and experience in analyzing materials for asbestos. About one half of her time on the job is devoted to asbestos identification. Her overall volumetric calculations have been within 5% of the second check.

The volumetric results of these 4 specimens were:

Sample #1 contained 35% asbestos
" #2 " 60% "
" #3 " 60% " (55 % chrysotile/5% amosite)
" #4 " 90-95% "

The samples sent in for analyses, in this and other cases, are large enough for numerous retests to be performed on material left over after the initial analysis.

The remainder of the samples are typically kept by DOE for one year at the laboratory, and then archived for several more years. There is no evidence that appellant Savage ever attempted to obtain a specimen from the four samples.

XI

Evidence was presented by PSAPCA Air Pollution Source Analyst Fred L. Austin that asbestos by volume can be converted to asbestos by

weight on a basically 1:1 ratio. The ratio can vary somewhat, depending upon the materials' specific gravity and density, but the 1 for 1 conversion is typically used throughout the United States.

Based on the foregoing conversion factors, all four samples tested far in excess of the 1% asbestos criteria of Regulation I, Section 10.02.

XII

Savage employees began work at 1104 NE 47th on the morning of March 23, 1987, and returned the keys of the building to Coppage Realty later that same day. Air sampling of the work area was performed by another company on March 24, 1987. Savage sent an invoice to Coppage, billing the latter for performance of the contract, which was received on March 31, 1987.

We find that by April 1, 1987, when PSAPCA inspected, Savage had completed its removal and disposal operations.

XIII

Savage's bid for the job at "4704 11th Avenue NE" proposed "to properly dispose of "all asbestos containing furnace and pipe insulation at the reference address." Coppage's response was phrased more broadly, accepting the bid "for the removal of <u>all asbestos material</u> located within that certain building located at 4700 - 4704 11th Avenue NE A/K/A 1104 NE 47th Street." (Emphasis added). The acceptance called for inspection by a separate company after the work and a report "stating that all asbestos has been removed."

Nothing in the record shows that Savage ever told Coppage that it believed the acceptance varied the offer. Nonetheless, Savage points out the passage of time between job completion and PSAPCA's inspection, suggesting intervening action by others. There is no evidence that any entity other than Savage was involved in asbestos removal at the site, either before or after Savage performed its work there.

Under the facts and circumstances, it is more probable than not that that the asbestos fragments found on the furnace room floor at the job site were the result of Savage's work.

XIV

We take judicial notice of our prior decisions in Savage Enterprises, Inc. v. PSAPCA, PCHB No. 86-101 (1987), Kent School District No. 415 and Savage Enterprises, Inc. v. PSAPCA, PCHB Nos. 86-190 and 86-195 (1987), and Savage Enterprises, Inc. and Northshore School District #417 v. PSAPCA, PCHB No. 86-179 (1988). In all three of these cases asserted violations of PSAPCA's asbestos regulation were sustained.

XV

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the subject matter and the parties. Chapter 43.21B RCW. The case arises under PSAPCA regulations implementing the Washington Clean Air Act, Chapter 70.94 RCW.

II

Notice and Order of Civil Penalty No. 6693, dated June 4, 1987, reads, in pertinent part, as follows:

> On or about the 1st day of April, 1987, in King County, State of Washington, you violated WAC 173-400-075 and Article 10 of Regulation I by causing or allowing the removal or encapsulation of asbestos materials at 1104 N.E. 47th (aka 4700-4704 11th N.E.), Seattle, Washington, and failing to comply with the following sections of Article 10 of Regulation I:
>
> 1. Section 10.03(a) & (b) of Regulation I: Failure to file with the Air Pollution Control Officer, written notice of intention to remove or encapsulate asbestos materials, accompanied by the appropriate fee and including the scheduled starting and completion dates of the asbestos removal or encapsulation --- Notice of Violation No. 021960.
>
> 2. Section 10.04(b)(2)(iii)(A) of Regulation I: Failure to adequately wet asbestos materials that have been removed or stripped and to ensure that they remain wet until collected for disposal --- Notice of Violation No. 021961.
>
> 3. Section 10.04(b)(2)(iii)(B) of Regulation I: Failure to collect asbestos materials that have been removed or stripped for disposal at the end of each working day --- Notice of Violation No. 021961.
>
> 4. Section 10.04(b)(2)(iii)(C) of Regulation I: Failure to contain asbestos materials that have been removed or stripped in a controlled area at all times until transported for disposal --- Notice of Violation No. 021961.

5. Section 10.05(b)(1)(i) of Regulation I: Failure to treat all asbestos-containing waste materials with water during collection, processing, packaging, transporting or deposition of any asbestos-containing waste material --- Notice of Violation No. 021962.

6. Section 10.05(b)(1)(iv) of Regulation I: Failure to treat all asbsestos-containing waste material with water and, after wetting, seal in leak-tight containers, while wet --- Notice of Violation No. 021962.

III

A critical avowed purpose of the Washington Clean Air Act and implementating regulations, including Regulation I, is to prevent release of asbestos fibers, a hazardous material, into the air. Whenever asbestos is or may be emitted into the atmosphere, the "harmful potential" test set forth in Kaiser Aluminum v. PCHB, 33 Wn. App. 352, 654 P.2d 723 (1982), is met. PSAPCA's work rules validly seek to prevent that harmful potential. Alpine Builders, Inc. & Tacoma School District No. 10 v. PSAPCA, PCHB Nos. 86-183 & 86-192 (Nov. 10, 1987). Therefore appellant's challenge to the lawfulness of applying PSAPCA's regulations to asbestos removal conducted inside the building is without merit.

IV

We conclude that the Notice and Order of Civil Penalty fails to describe the violation of WAC 173-400-075 with "reasonable particularity", as required by RCW 70.94.431. The mere recitation of the section number is insufficient to provide any idea of the content

of the federal regulations incorporated by reference therein, or of the specific portion of those regulations alleged to have been violated. Savage Enterprises, Inc. v. PSAPCA, PCHB No. 86-101 (April 17, 1987).

However, we conclude the Notice and Order of Civil Penalty was of sufficient particularity to provide adequate notice to appellant as to the violations of Article 10 of PSAPCA's Regulation I. It recited the date and location of the violation, and described the content of the specific Regulation I sections alleged to be violated. In addition, during the six-months pendency of this appeal, Savage had available the full range of civil discovery to further clarify the legal contours. Chpt. 371-08 WAC. Appellant failed to avail itself of these litigation tools. It cannot be now heard to complain. See, Marysville v. PSAPCA, 104 Wn.2d 115, 702 P.2d 469 (1985).

V

Appellant Savage concedes that it removed asbestos from 1104 NE 47th. We conclude that Savage did violate Regulation I, Section 10.03 by failing to file with PSAPCA a Notice of Intent to Remove Asbestos from that location. Appellant's mere argument that they provided notice, was unsupported by any documentary evidence, or by direct knowledge.

VI

We conclude that PSAPCA has demonstrated that the testing procedure which leads to the preparation of Asbestos Analysis Reports

by DOE's laboratory is a generally accepted test, the results of which, within a range of 5% as to the percentage of asbestos, can be regarded as factual and not the expression of opinion.

Accordingly, we decide that we can admit the test results in future cases as meeting the public records exception to the hearsay rule. See, RCW 5.44.040. Kaye v. State Department of Licensing, 34 Wn. App. 132, 659 P.2d 548 (1983). Based on the record made here, we announce that we will in the future depart from the approach taken in Alpine Builders, Inc. and Tacoma School District No. 10, supra, on this point.

Moreover, we were convinced that using a 1 to 1 conversion ratio for translating the percentage by volume of asbestos observed in the laboratory into the percentage by weight of asbestos is generally accepted and appropriate in evaluating cases under PSAPCA's regulations. We will, therefore in future cases take judicial notice of this conversion ratio, recognizing of course that what is being converted is subject to around a 5% error. Thus, the showing we held to be lacking in Long Services Corporation v. PSAPCA, PCHB No. 86-191 (Nov. 10, 1987), has now been made and the failure to prove the conversion ratio will no longer serve as grounds for reversal.

VII

We conclude that the material analyzed by the DOE was "asbestos material" as that term is defined by Section 10.02(e) of Regulation I:

> "Asbestos material" means any material containing at least one percent (1%) asbestos by weight, unless it can be demonstrated that the material does not release asbestos fibers when crumbled, pulverized or otherwise disturbed.

Savage made no showing that the asbestos material found on the furnace room floor was not friable.

VIII

The term "asbestos removal" is defined in Regulation I, Section 10.02(f), as follows:

> "Asbestos removal" means to take out asbestos materials from any facility and includes the stripping of any asbestos materials from the surface of or components of a facility.

Section 10.04(b)(2)(iii), under which appellant is cited, relates to "asbestos materials that have been removed or stripped." Savage argues that the samples taken from material still on pipes or wall surfaces cannot be the basis for violations of that subsection.

We do not need to decide here whether fragments still adhering to facility surfaces after a stripping operation can be the basis for violation of Section 10.04(b)(2)(iii). In this case, fragments were left on the furnace room floor after stripping and as a result of removal from facility components. The materials found on the floor evidenced violations as follows: 1) they were not kept wet until placed in a leak-tight container; 2) they were not collected for disposal at the end of each working day; 3) they were not kept in an

area to which only certified asbsestos workers had access until transported to a waste disposal site. Section 10.04(b)(2)(iii)(A),(B), and (C). See Sections 10.02(h) and (i).

IX

Section 10.04 deals with asbestos removal, from the stripping process through the sealing of discarded material in leak-tight bags safely ready for transport. Section 10.05 deals with the disposal process and makes reference to the "collection, processing, packaging, transporting or deposition of any asbestos-containing material." The two sections overlap to some degree.

Here the discovery of dry friable asbestos on the furnace room floor after both the removal and disposal phases were complete is enough to demonstrate noncompliance under either Section 10.04 or 10.05. However, we have, consistently refused to find violations of both sections when a single act or omission was involved. Ballard Construction Co. v. PSAPCA, PCHB No. 87-37 (March 17, 1988).

We adhere to that approach here. We conclude that the three cited aspects of Section 10.04 were violated during removal, and we decline to find separate violations of Section 10.05.

X

The purpose of civil penalties is to promote future compliance with the law. AK-WA, Inc. v. PSAPCA, PCHB No. 86-111 (Feb. 13, 1987). The failure to provide notice to PSAPCA is a violation of

heightened concern. Without such notice, PSAPCA would be severely impeded from performing its statutory enforcement responsibilities. Given the dual notice and failure to properly remove violations, and in light of Savage's past history of violations, we conclude the $1,000 penalty is merited.

XI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such. From these Conclusions the Board enters the following

ORDER

Notice and Order of Civil Penalty No. 6693 is AFFIRMED.

DONE this 28th day of March, 1988.

POLLUTION CONTROL HEARINGS BOARD

Judith A Bendor
JUDITH A. BENDOR, Presiding

Wick Dufford
WICK DUFFORD, Chairman

Lawrence J. Faulk 3/25/88
LAWRENCE J. FAULK, Member